

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>RICHARD FLOWERS,</b>	)	
<b>Charging Party,</b>	)	
	)	
<b>v.</b>	)	<b><u>ULP No. 05-02-468</u></b>
	)	
<b>JACKIE HERBERT, PRESIDENT,</b>	)	
<b>ATU, LOCAL 842</b>	)	
<b>Respondent.</b>	)	

**BACKGROUND**

At the time this charge was filed Richard Flowers (“Flowers” or “Charging Party”) was a public employee within the meaning of 19 Del.C. §1302(o) of the Public Employment Relations Act (“Act” or “PERA”). Flowers was employed by the Delaware Transit Corporation (“DTC”), a public employer within the meaning of 19 Del. C. §1302(p), as a Fixed Route Driver at the time his employment was terminated on or about September 28, 2004. At all times relevant to this Charge, Charging Party was a member of the Amalgamated Transit Union, Local 842 (“ATU”).

ATU is the exclusive bargaining representative of the Fixed Route Drivers employed by DTC within the meaning of 19 Del.C. §1302(j). DTC and ATU, Local 842, are parties to a collective bargaining agreement for the period December 1, 2002, through November 30, 2007. Jackie Herbert, President, ATU, Local 842, (“Herbert” or “Respondent”) is the former President of the ATU and while in that capacity was a

designated representative of an employee organization within the meaning of §1302(i) of the PERA.

On February 16, 2005, Charging Party filed this unfair labor practice charge against Herbert alleging violations of 19 Del.C. Chapter 13, the Public Employment Relations Act (“PERA” or “Act”), specifically §1307(a)(1) through (8) and §1307(b)(1) through (6).

On April 15, 2005, the Executive Director issued the following Probable Cause Determination.

1. Consistent with the foregoing discussion, the pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1307(a)(1) through (a)(8), as alleged, may have occurred.
2. The pleadings fail to establish probable cause to believe that a violation of 19 Del.C. §1307 (b)(2), (b)(4), (b)(5) or (b)(6), may have occurred.
3. The pleadings establish probable cause to believe that a violation of 19 Del.C. §1307(b)(1) and/or (b)(3) may have occurred.

The Executive Director held that deferral to arbitration, as requested by the Respondent, was inappropriate in this matter because the underlying issue involved neither an alleged contract violation nor the merits of Charging Party’s grievance, but rather whether there was interference with the grievant’s statutory right to representation.

A hearing was held on June 29, 2005, at which the parties presented testimony and documentary evidence in support of their respective positions. Written closing argument was received by the hearing officer on August 22, 2005. The following discussion and decision result from the record thus compiled.

## **ISSUE**

Whether a violation of 19 Del.C. §1307(b)(1) and/or (b)(3), as alleged, occurred?

## **PRINCIPAL POSITIONS OF THE PARTIES**

Charging Party: Charging Party argues that following his discharge the ATU, specifically ATU President, Jackie Herbert, failed to process the resulting grievance.

Herbert: The Delaware PERB has held that to establish a breach of the duty of fair representation, a charging party must establish that the union's conduct was arbitrary, discriminatory or in bad faith. It is clear in this matter that the crux of Charging Party's complaint is simply that things did not unfold in the way he desired.

The grievance protesting the grievant's discharge was processed through the contractual grievance procedure to arbitration. At each step of the grievance procedure the ATU provided Charging Party with informed and capable representation in the person of the ATU Vice President, President and legal counsel. As a result, the grievant was reinstated with full back pay and benefits.

## **DISCUSSION**

A breach of the duty of fair representation occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith . . . ." Vaca v. Sipes, 386 U.S. 171 (1967). See also Granville R. Morris v. Delaware Correctional Officers Association and State of Delaware, Department of Correction, ULP No. 99-12-272, Del. PERB, III PERB 2161 (2001).

Here, the negotiated grievance procedure permits the union to waive steps in the grievance procedure. Such a provision is not uncommon in that it allows a grievance to be considered by union and management representatives with the requisite authority to resolve disputes at the earliest possible step of the grievance procedure.

The processing of Charging Party's grievance commenced at a Step 3 meeting held on August 25, 2004. Charging Party attended and was represented by ATU Vice President, Wali Rushdan, and ATU Steward, Eileen Chubbs.

Unable to resolve the matter, ATU President Herbert, by e-mail dated September 20, 2004, appealed the grievance to Step 4, of the contractual grievance procedure. Herbert so notified the grievant by certified letter dated September 28, 2004. The step four meeting was held on October 5, 2004. The State Director of Labor Relations attended in place of the Deputy Director for Employee Relations, as set forth in the collective bargaining agreement.

Charging Party attended the step 4 meeting, was represented by ATU President Herbert, and provided with the opportunity to actively participate. Management offered to reinstate Flowers without back pay but with the right to arbitrate the back pay issue. However, DTC's settlement offer was rejected by Charging Party because of the "last chance" condition attached.

As required by the local ATU's bylaws and its practice, authorization to proceed to arbitration requires an affirmative vote by the bargaining unit membership. Charging Party addressed the bargaining unit with regard to his grievance on August 13, 2004. The general membership voted not to authorize the arbitration of Charging Party's grievance.

Charging Party then contacted the International Union which, by letter from the International Vice President dated November 10, 2004, directed the local union to submit Charging Party's grievance to arbitration. An arbitrator was selected pursuant to the rules of the American Arbitration Association and the grievance was heard on May 3, 2005, before arbitrator J. Joseph Lowenberg. Charging Party was represented by ATU counsel Joseph S. Pass, Esquire, who, following the close of the hearing, submitted a written post-hearing brief in support of the Union's position that the discharge of Charging Party was not for "just cause" and requested that Charging Party be reinstated and made whole.

By decision dated June 17, 2005, Arbitrator Lowenberg reinstated Charging Party with full back pay and benefits.

The only material fact established by Charging Party was that the State Deputy Director for Employee Relations did not attend the Step 4 grievance hearing as provided for in Section 7, Step 4, of the collective bargaining agreement. The Deputy Director's designee, the State Director of Labor Relations, attended in place of the Deputy Director. This substitution constituted, at most, a technical violation of the collective bargaining agreement which is not at issue here. Most importantly, the substitution did not affect the grievant's due process rights.

It is noted that, at all times relevant to this matter, conflict existed between factions within the ATU. Charging Party and the Respondent were on opposite sides of the conflict. Based upon the hearing record and the foregoing discussion it is apparent that this Charge originated more from internal union politics rather than a failure by the Respondent to adequately represent Charging Party in his pursuit of reinstatement.

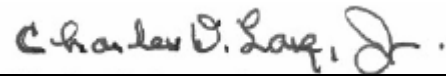
**DECISION**

The Respondent did not violate 19 Del.C. Section 1307(b)(1) and/or Section (b)(3), as alleged.

Therefore, the Charge is dismissed.

**IT IS SO ORDERED.**

Dated: September 7, 2005

A handwritten signature in dark ink, reading "Charles D. Long, Jr." with a stylized flourish at the end.

---

Charles D. Long, Jr.,  
Executive Director